

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

NEW SEASONS, INC.

Employer/Petitioner

and

NEW ENGLAND HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199, SEIU, AFL-CIO

Union ¹

Case No. 34-UC-127

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find that the hearing officer's rulings are free from prejudicial error and are affirmed, and that the Employer/Petitioner (hereinafter referred to as the Employer) is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

The Employer filed the instant petition to clarify the bargaining unit presently represented by the Union to specifically exclude the following five positions from the unit as statutory supervisors:

1. Residential Unit Manager;
2. Staff Development Coordinator (herein referred to as Scheduler);
3. Staff and Training Coordinator (herein referred to as Trainer);
4. Day Treatment Unit Coordinator; and
5. Habilitation Specialist II.

The Union contends that the petition should be dismissed because none of these employees are supervisors within the meaning of Section 2(11) of the Act.

For the reasons noted below, I find that the Employer has satisfied its burden of establishing that the Residential Unit Manager, Day Treatment Unit Coordinator, the Scheduler and the Trainer are supervisors within the meaning of Section 2(11) of the Act, thereby warranting their exclusion from the unit. I further find, however, that the Employer has failed to satisfy its burden of establishing that the Habilitation Specialist II is a supervisor within the meaning of the Act, and I shall deny the Employer's request to exclude that position from the unit and grant the Union's motion to dismiss the petition as to that position.

I. Background

The Employer, a non-profit Connecticut corporation with its administrative offices located at 243 Main Street, Manchester, Connecticut, provides residential and day treatment services to individuals with developmental disabilities at various sites located throughout Northeastern Connecticut. The Union has been recognized by the Employer as the exclusive collective bargaining representative of certain employees since at least 1988. The most recent collective bargaining agreement between the parties was effective from April 1, 1999 to March 31, 2003, in which the Employer recognizes the Union as the representative of the following employees (herein called the Unit):

All direct care staff, including day treatment unit coordinator, day treatment program coordinator, residential unit manager, house supervisor, nurse supervisor, habilitation specialist I and II, habilitation assistant, dietary/maintenance aide, residential specialists, residential assistant, maintenance specialist, and transportation officer, but excluding the executive director, director of programs and services, administrator on call, director of nursing, business office staff and recreation aides and consultants.

As noted above, the Residential Unit Managers, the Day Treatment Unit Coordinator, and the Habilitation Specialists II are specifically included in the Unit description, but the Scheduler and Trainer are not. These positions were added to the Unit by the parties in about September 1998 and August 2000, respectively.

The Employer's operations are comprised of the Residential Division and the Day Division. The Residential Division encompasses seven group homes that are staffed around the clock by approximately 90 Unit employees in the following positions: the disputed Residential Unit Managers; House Supervisors; LPNs; Residential Specialists; and Residential Aides (a/k/a Residential Assistants). The disputed Scheduler and Trainer are also assigned to the Residential Division, but their regular work location is at the Employer's administrative office rather than a group home.

The Day Division consists of a single location at 241 Garden Grove Road in Manchester, Connecticut. It operates Monday through Friday from 7:30 a.m. to 3:30 p.m. and is staffed by about 19 Unit employees in the following positions: the disputed Day Treatment Unit Coordinator, LPNs, Habilitation Specialists I, the disputed Habilitation Specialists II, Habilitation Assistants (a.k.a. Aides) and maintenance employees.

Executive Director Keith Lavalette is primarily responsible for the Employer's overall operations. Reporting directly to Lavalette is Assistant Director Kate Porter and Director of Nursing Roz Fletcher.

A. The Residential Division

1. Residential Unit Managers

There are presently six disputed Residential Unit Managers. They report to both the Executive Director and the Director of Nursing. The Residential Unit Manager is the highest-ranking employee at a group home. As noted above, the group homes are staffed 24 hours a day, with employees working staggered, overlapping shifts. The Residential Unit Managers regularly work the first shift. The second and third shifts are covered by Residential Specialists, who report to the Residential Unit Manager.

Residential Unit Managers are generally responsible for overseeing the operation of their assigned group home. This includes ensuring that clients' medical, behavioral and physical needs are being met by the staff; monitoring clients' behavioral treatment programs; communicating changes in clients' treatment programs to the staff at in-service meetings; holding regular staff meetings; scheduling client medical appointments; and completing "paperwork" documenting client treatment regimes that are required by the State of Connecticut Department of Mental Retardation. On the rare

occasion that a group home is understaffed, Residential Unit Managers may perform duties typically performed by the Residential Aides, such as preparing meals, cleaning, and washing clothes.

With regard to Residential Unit Managers' direction of the work of the employees assigned to their group home, the evidence varies. In this regard, Residential Unit Manager Vose testified that she regularly assigns and reassigns work in her group home, while others testified that employee tasks are so well established and ingrained that there is little or no need to designate specific duties to specific employees.

With regard to disciplining employees, the Employer maintains a progressive discipline system that starts with counseling and progresses through oral warning, written warning, suspension and/or probation, and discharge. The Residential Unit Managers' job description requires them to "supervise and discipline staff according to the agency's policies and procedures and the union contract". In this regard, the Employer advised the Residential Unit Managers on proper disciplinary procedures at a February 26, 2002 management meeting. During that meeting, the Employer's counsel reviewed the disciplinary policy and procedures and distributed new disciplinary action forms to those in attendance. In accordance with their authority described above, Residential Unit Managers have issued verbal counseling and oral and written warnings to the employees under their direction without approval from any higher authority. Moreover, such disciplinary actions have an impact on employee job status. In this regard, the disciplinary notices issued by the Residential Unit Managers for such infractions as absenteeism, insubordination, carelessness and chronic complaining, specifically warn that any further infractions will lead to more severe discipline. In addition, according to the parties' collective bargaining agreement, employees with disciplinary records are considered unqualified and ineligible for promotional and/or transfer opportunities.

All suspension and discharge decisions are made by the Executive Director after discussion with and input from the Residential Unit Manager. The Executive Director has, in most but not all cases, followed the Residential Unit Manager's recommendation.

With regard to evaluating employees, Residential Unit Managers prepare annual performance evaluations for regular employees and monthly evaluations for probationary employees. In this regard, they fill out a performance appraisal form that has numerical ratings in 12 areas of competency, along with narrative comments.² A sum total is derived by totaling the score assigned in each area of competency, which is then divided by 12 to obtain an overall performance ranking. In the case of second and third shift employees, the Residential Unit Manager prepares the evaluation in collaboration with the Residential Specialist who has had the opportunity to directly observe the employee's job performance.³ Once completed, the evaluations are forwarded to the Employer's administrative office for review by the Director of Nursing, Assistant Director and Executive Director, who each in turn sign off on the evaluation. At least one Residential Unit Manager was informed by higher management that her ratings were generally too high and should be lowered across the board. Other Residential Unit Managers were instructed by higher management to assign scores that more accurately reflect employee job performance, rather than assigning artificially inflated scores as a means of avoiding potential discord with the employee. Nevertheless, there is no evidence or claim that any Residential Unit Manager's recommended ranking has been altered or modified by the Director of Nursing, Assistant Director or Executive Director. The final signed evaluation is returned to the Residential Unit Manager for review with the employee.

Although performance evaluations play no role with respect to wage increases because those are governed solely by the terms of the collective bargaining agreement, they do play a role in determining whether probationary employees will be retained and whether promotional and transfer opportunities will be afforded regular employees. In this regard, the parties' most recent collective bargaining agreement provides that "[a]n employee ... whose performance most recently has been rated as below the "Good" rating, or who is below average, shall not be qualified for the vacancy ml [sic] shall not be eligible for consideration."

² However, the competency area involving attendance is, in most cases, completed by the Scheduler, as discussed below.

³ As noted above, the Residential Specialists are Unit employees.

With regard to the scheduling of employees, Residential Unit Managers have no authority to approve time off or grant overtime. Those functions rest primarily with the disputed Scheduler, and in her absence the disputed Trainer, as discussed in detail below. Residential Unit Managers also have very little involvement in hiring, which is predominately the responsibility of the Scheduler and Trainer, as discussed below.

Residential Unit Managers attend weekly or biweekly management meetings that are conducted by the Executive Director, Assistant Director, and Director of Nursing. Various issues relating to the functioning of the group homes and the day program are discussed, including any changes in client treatment plans and, as noted above, the employee disciplinary procedures.

It is well established that the burden of proving supervisory status is upon the party asserting it. *NLRB v. Kentucky River Community Care*, 121 S.Ct 1861, 1866-1867 (2001). Based upon the foregoing and the record as a whole, I find that the Employer has satisfied its burden of proving that the Residential Unit Managers are supervisors within the meaning of the Act. More particularly, I note that the Residential Unit Managers have the authority to discipline and evaluate employees, or effectively to recommend such actions. *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984); *Concourse Village, Inc.*, 276 NLRB 12, 13 (1985)(superintendents).

Accordingly, I shall clarify the unit to exclude Residential Unit Managers.

2. Scheduler and Trainer

As noted above, the disputed Scheduler and Trainer also work within the Residential Division. They report to the Executive Director. Unlike all other Residential Division employees, the Scheduler and Trainer work at the Employer's administrative offices and not in a group home. The Residential Unit Managers previously performed the duties presently performed by the Scheduler and Trainer. However, a few years ago, the Employer decided to create these two new positions in order to centralize scheduling and training functions for all group homes. Initially only one position was created, but because the duties soon proved to be too expansive for a single person to manage, the duties of the one position were divided to create two separate positions.

Sue Pearson is presently the Scheduler, and the Trainer is Farideh Amini. Like the Residential Unit Managers, Pearson and Farideh attend the weekly or bi-weekly management meetings.

As the Scheduler, Pearson is responsible for insuring that there is adequate shift coverage for the entire Residential Division. Amini performs such duties in Pearson's absence. Thus, all Residential Division employees contact Pearson when they are unable to report to work, and it is Pearson's responsibility to secure coverage for the vacancy. Pearson is authorized to grant voluntary overtime in securing such coverage without any advance approval from higher management. She also secures coverage for shift vacancies created due to employee vacations. In this regard, all Residential Division employee requests for vacation and other time off are submitted to Pearson by the Residential Unit Managers. Pearson then authorizes the request so long as the requesting employee has sufficient accumulated time. However, if the request results in taking unpaid time off, she denies the request and alerts the employee that they should submit an unpaid time off request to the Executive Director.

Pearson conducts monthly audits to determine each employee's accrued vacation, sick and personal time, as well as regular audits of employee rates of absenteeism and tardiness. If she detects repeated incidents of absenteeism or tardiness as a result of these audits, Pearson alerts the appropriate Residential Unit Manager to the problem so that the latter can initiate disciplinary procedures. In this regard, although Pearson has the authority, which she claims to have exercised, to discipline employees for chronic attendance problems, she prefers that the Residential Unit Manager assume that task since they are directly involved with the employee and may be aware of any extenuating factors.⁴

As the Trainer, Amini is responsible for coordinating Residential Division employee training, and monitoring employee certification in such areas as CPR, first aid, OSHA, and administering medications. It is also Amini's responsibility to advise all

⁴ Although Pearson in most cases completes the attendance section of employee evaluations, this appears to be a ministerial act because the employee's absenteeism rate is the sole determinate of the score she assigns.

new hires of their obligation to obtain a public service drivers' license within 45 days of hire and to monitor their compliance with that requirement. Pearson performs such duties in Amini's absence.

Pearson and Amini are jointly responsible for hiring new employees for the Residential Division. All such employees are hired on a per diem basis, after which they presumably can progress to permanent employment.⁵ In conducting such hiring, Pearson and Amini sort through applications already on file and determine which applicants to invite for an interview. They conduct the interview process by themselves or, if one of them is absent, with the disputed Day Treatment Unit Coordinator. It is wholly within their discretion whether or not to extend an offer of employment, with no further approval required from higher management.

Based upon the foregoing and the record as a whole, I find that the Employer has satisfied its burden of proving that the Scheduler and Trainer are supervisors within the meaning of the Act. More particularly, I note that the Scheduler has the authority to assign and responsibly direct employees, or effectively to recommend such actions, *Custom Bronze and Aluminum Corp.*, 197 NLRB 397 (1972), and that the Scheduler and Trainer have the authority to hire employees. *The Lawson Milk Co.*, 143 NLRB 916, 919 (1963). Accordingly, I shall clarify the unit to exclude the Scheduler and Trainer.

B. The Day Division

The Day Division is responsible for providing the Employer's clients with recreation and leisure activities. Primarily responsible for the daily operation of the Day Division is disputed Day Treatment Unit Coordinator Delci Thompson, who reports directly to the Executive Director. Reporting to Thompson are the two disputed Habilitation Specialists II, one Habilitation Specialist I, 12 Habilitation Aides, and an unspecified number of maintenance employees.

1. Day Treatment Unit Coordinator

Thompson does not possess a nursing degree and has, for the most part, no direct patient care responsibilities. Rather, she is responsible for scheduling Day Division employees. To insure adequate shift coverage, Thompson can authorize

⁵ During the past two years they have only hired employees to fill the entry level Residential Aide position, because all present group home employees have the first opportunity to fill vacancies for higher positions before those positions are made available to the public at large.

overtime and approve time off requests. Such approval is subject to veto by the Scheduler in the event that the employee has insufficient accumulated time. However, because Thompson keeps her own independent accounting of employees' accumulated time, none of the time off requests that she has approved have been vetoed.

Like the Residential Unit Managers, Thompson may discipline employees by issuing oral and written warnings without the approval of higher management. However, Thompson prefers to discuss disciplinary matters with the Executive Director prior to actually issuing discipline. In this regard, Thompson testified that if the discipline involved an unambiguous rule or policy violation, such as attendance, she would merely inform the Executive Director of her decision to issue the discipline. If the conduct for which she is contemplating discipline involves "gray areas", she will seek out the guidance of the Executive Director to ensure consistent application of disciplinary policy. For example, an employee under Thompson's direction was a "no-call/no-show", which according to Thompson warrants discharge. Thompson believed that there were extenuating circumstances that did not warrant discharge, so she recommended to the Executive Director that the employee be given a final written warning. The Executive Director agreed with her recommendation and the employee was issued a final written warning. Although not recently, Thompson has also suspended employees, but not without first advising the Executive Director. On one occasion, Thompson recommended that a probationary employee not be retained, due in part to her disciplinary record. Agreeing with her recommendation, the Executive Director discharged the probationary employee.

Also like the Residential Unit Managers, Thompson prepares annual performance evaluations for the Habilitation Specialists I and II and maintenance employees. In this regard, she completes the performance appraisal form with numerical ratings and narrative comments, and an overall performance ranking. She prepares the evaluations for the Habilitation Aides in conjunction with the disputed Habilitation Specialists II. In this regard, the Habilitation Specialists II recommend numerical ratings and the overall performance ranking for the Habilitation Aides with whom they work. Thompson and a Habilitation Specialist II jointly concur on the final performance ranking, and they both sign the evaluation. Once completed, all

evaluations are forwarded to the administrative offices for review by the Director of Nursing, Assistant Director and Executive Director, who each in turn sign off on the evaluation. The evaluation is then returned for review with the employee by either Thompson, the Habilitation Specialists II, or both. Although the Assistant Director has returned evaluations for additional narrative comments or grammatical corrections, the performance appraisal scores assigned by Thompson either alone, or in conjunction of the Habilitation Specialists II, have not been changed by higher management.

As noted above, Thompson has substituted for the Trainer or Scheduler in the hiring process and, in such cases, has recommended applicants for hire. Her recommendations are generally followed. She attends the weekly or bi-weekly management meetings.

Based upon the foregoing and the record as a whole, I find that the Employer has satisfied its burden of proving that the Day Treatment Unit Coordinator is a supervisor within the meaning of the Act. More particularly, I note that the Day Treatment Unit Coordinator has the authority to assign, evaluate⁶ and discipline⁷ employees, or effectively to recommend such actions. *Pine Manor Nursing Center*, supra. Accordingly, I shall clarify the unit to exclude the Day Treatment Unit Coordinator.

2. Habilitation Specialists II

Katrina Smith and Mary Bessette are the disputed Habilitation Specialists II. They report directly to Thompson, and reporting directly to them are the Habilitation Aides. Each day Bassette and Smith rotate the Habilitation Aides pursuant to pre-determined work assignments. Bessette is primarily responsible for completing administrative “paperwork” concerning clients’ behavioral issues, while Smith spends approximately 90% of her time performing direct patient care duties alongside the Habilitation Aides. The record is silent as to the amount of time Bassette spends in

⁶ With regard to the evaluation process, I note that the Day Treatment Unit Coordinator’s ability to effectively evaluate employee performance is not diminished by the input received from the Habilitation Specialists II, who I have found, *infra*, are not supervisors under the Act.

⁷ With regard to the disciplinary process, the Day Treatment Unit Coordinator’s practice of consulting with higher management is not inconsistent with her authority to effectively recommend or administer disciplinary action.

performing direct patient care duties. Bassette and Smith are both responsible for ensuring that changes in client treatment regimes are properly implemented. They do not attend the weekly or bi-weekly management meetings.

With regard to disciplining employees, Smith testified that she has no authority to issue any discipline to employees without the approval or direction of Thompson. Rather, she first discusses potential disciplinary issues with Thompson, which may result in a joint meeting with the employee. Although Smith signed one oral warning notice that was given to an employee for “failure to follow instructions”, she was specifically instructed by Thompson to issue the warning. Furthermore, on the warning notice, an unidentified person filled in the level of discipline being imposed for the infraction and that any further incidents would result in a written warning. The only portion of the warning notice completed by Smith was a narrative description of the incident that led to the discipline. There is no evidence regarding Bassette’s involvement in disciplining employees.

With regard to evaluating employees, as noted above, Bassette and Smith participate with Thompson in the preparation of the Habilitation Aides’ annual performance appraisal. Bassette and Smith’s input is based upon the fact that they work side-by-side with the Habilitation Aides and are in the best position to analyze the latter’s work. The final numerical ratings and performance rankings are reached by consensus.

Smith occasionally substitutes for Thompson in the latter’s absence, but the record does not reveal the length or frequency of such occurrences or whether Smith performs any of Thompson’s supervisory duties on such occasions. In this regard, Smith testified that while substituting for Thompson, she has no authority to grant time off, and instead merely signs off on the time off request form and forwards the form to the Payroll/Benefits Administrator for approval. With regard to obtaining shift coverage when an employee calls out sick, Smith testified that she utilizes a list kept by Thompson, and proceeding from the top down, she makes calls until she obtains coverage. There is no evidence that Bassette substitutes for Thompson in her absence.

Based upon the foregoing and the record as a whole, I find that the Employer has failed to satisfy its burden of proving that the Habilitation Specialists II are supervisors within the meaning of Section 2(11) of the Act. More particularly, I note that the Habilitation Specialists II do not exercise independent judgment in assigning and directing the work of other employees, but rather serve as a conduit for orders and directions from higher management, and otherwise lack any of the statutory indicia of supervisory authority. See, e.g., *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Quality Chemical, Inc.*, 324 NLRB 328, 330 (1997). Thus, it appears that the primary duties of the Habilitation Specialists II involve direct patient care in conjunction with the Habilitation Aides, and that their incidental assignment of work to the Habilitation Aides is limited to that which has already been previously scheduled and assigned, with any further assignments and changes in assignments being routine in nature and not requiring the exercise of independent judgment. See *Millard Refrigerated Services, Inc.*, 326 NLRB 1437 (1998); *Byers Engineering Corp.*, 324 NLRB 740 (1997). Furthermore, their involvement in the discipline and evaluation of employees is primarily reportorial in nature and is insufficient to confer supervisory status. See *Quadrex Environmental Co.*, supra; *Quality Chemical, Inc.*, supra; *Coventry Health Center*, 332 NLRB 52 (2000); *Chicago Metallic Corp.*, 273 NLRB 1677, 1688-1694 (1985). Finally, there is insufficient evidence to establish that either Smith or Bassette exercise any supervisory authority while substituting for Thompson. *Concourse Village*, supra, at 13 (handymen); *Fred Rogers Co.*, 226 NLRB 1160, 1161 (1976).

Accordingly, I shall deny the Employer's request to clarify the unit to exclude the Habilitation Specialists II, and I shall grant the Union's motion to dismiss the petition regarding that position.

ORDER

IT IS HEREBY ORDERED that the unit is clarified to exclude the Residential Unit Managers, the Scheduler, the Trainer, and the Day Treatment Unit Coordinator. It is further ordered that the petition is dismissed with regard to the Habilitation Specialists II.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by May 27, 2003.

Dated at Hartford, Connecticut this 13th day of May, 2003.

/s/ Peter B. Hoffman

Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34

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